

10 Official Opinions of the Compliance Board 57 (2016)

- ◆ **6(D) MINUTES – SUMMARY OF PRIOR CLOSED SESSION, TO BE INCORPORATED BY REFERENCE IN MINUTES IF KEPT AS SEPARATE DOCUMENT**
- ◆ **1(C)(2) ADMINISTRATIVE FUNCTION EXCLUSION - WITHIN THE EXCLUSION: SCHOOL BOARD’S PERFORMANCE EVALUATION OF SUPERINTENDENT**
- ◆ **1(J) QUASI-LEGISLATIVE FUNCTION - DISCUSSION OF EMPLOYMENT CONTRACT**
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*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at https://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

June 10, 2016

Re: Howard County Board of Education
Craig O'Donnell, *Complainant*

June 10, 2016

Complainant Craig O'Donnell primarily alleges that the Howard County Board of Education (“school board”) violated the Open Meetings Act by meeting behind closed doors to evaluate the superintendent’s performance and discuss the renewal of her contract. Complainant also alleges that the school board violates the Act because it keeps written minutes of some meetings but provides live, streaming audio minutes for others and that the school board does not sufficiently invite the public to attend its votes to meet in closed session and does not sufficiently disclose its reasons for meeting in closed session. Further, Complainant alleges that the school board did not provide any notice of two meetings in December 2015.

In keeping with our longstanding advice and the plain language of the Act,¹ we conclude that the public was not entitled to observe the school board's evaluations of the superintendent's performance. Also, had the school board met the conditions for closing a meeting, the public would not have been entitled to observe its discussions about her compensation. However, we conclude that the school board violated the Act by posting some meetings as entirely closed and not posting others at all, and by not disclosing, before meeting in a closed session, the school board's reasons for excluding the public. As a more technical matter, if the school board continues to issue its closed-session summaries as a document separate from the minutes of its next open-session, those minutes must incorporate the summaries by reference. We further find that the school board violated the Act by failing to give notice of its December 3, 2016 meeting.

We begin with the Complainant's assertion that the school board should have admitted the public to its performance evaluations of the superintendent. As explained in 1 *OMCB Opinions* 123 (No. 95-5)(1995), and again in 3 *OMCB Opinions* 159 (No. 01-18)(2001),² school boards perform an administrative function when they conduct a performance evaluation, and a public body's performance of an administrative function is not subject to the Act. We incorporate both explanations here and conclude that the Act did not apply to the meetings that the school board held in November 2015 to conduct performance evaluations. The fact that the school board completed, and disclosed, written closing statements for these meetings does not mean that they were subject to the Act. *See, e.g.,* 9 *OMCB Opinions* 206, 214 (2015) (noting that ethics commission acted "prudently" in creating a closing statement for an administrative-function session given some uncertainty about the scope of the exclusion, but that it was not required to do so).³ The applicability of the administrative exclusion exception does not depend on "how important the matter might be considered or how keen the public interest in it." 9 *OMCB Opinions* 290, 292 (2015) (quoting 8 *OMCB Opinions* 107,109 (2012)).

We turn next to the Complainant's assertion that the school board should have publicly discussed the renewal of the superintendent's contract before acting on it. As explained in 1 *OMCB Opinions* 123 and 3 *OMCB Opinions* 159, discussions involving approval of a superintendent's contract are "quasi-legislative" in nature and subject to the Act. Therefore, the school board could not exclude the public from its meetings to discuss the superintendent's contract unless the topic fell within one of the Act's

¹ Statutory citations are to the General Provisions Article of the Maryland Annotated Code (2014, with 2015 supp.)

² These opinions are posted at <https://www.oag.state.md.us/Opinions/Open1995/om95-5.pdf> and <https://www.oag.state.md.us/Opinions/Open2001/om01-18.pdf>.

³ <https://www.oag.state.md.us/Opinions/Open2013/9omcb206.pdf>

fourteen exceptions. See §§ 3-101(i) (defining “quasi-legislative” function); 3-305 (permitting public bodies to close a meeting under an exception).⁴ For its January 12, 14, and 21, 2016, meetings, the school board claimed the “personnel exception,” which permits a public body to hold a closed session to discuss the “appointment,” “employment,” “compensation,” or “performance evaluation” of an “appointee, employee, or official” over whom the public body has jurisdiction. § 3-305(b)(1).

For the scope of the personnel exception, we incorporate our opinion at 9 *OMCB Opinions* 167 (2014), where Complainant had alleged that a town council had impermissibly discussed a manager’s contract in closed session. There, we concluded that the town council’s discussion fell within the exception. See *id.* at 169 (applying the exception now codified as § 3-305(b)(1) of the General Provisions Article of the Maryland Annotated Code). To the same effect, we concluded in 1 *OMCB Opinions* 123 that a school board’s discussion about a superintendent’s contract amendment “was permissibly done in closed session.” *Id.* at 124. We reach the same result here: the school board permissibly excluded the public from its discussions about the superintendent’s employment contract. However, on December 10, 2015, the school board held a closed meeting at which it “reviewed the process” of the superintendent’s evaluation and “discussed modifications.” We cannot tell from this description whether the discussion was part of the evaluation (and thus administrative), part of the contract renewal discussions (and thus within the personnel discussion), or instead a review of the evaluation process generally and the need for any modifications to it. A discussion of the process generally would have exceeded the scope of the personnel exception, which is confined to the discussion of a particular employee’s employment, and would not have been administrative in nature.

Next, we address Complainant’s allegations that the school board did not give proper notice of the closed meetings that it held on December 3 and December 10, 2015. The December 3 session did not fall within the administrative exclusion discussed above or any other exclusion, so the meeting was subject to the Act, and, more specifically, to the public notice requirement in § 3-302. From the information provided to us, it appears that the school board did not give public notice of the December 3 meeting and therefore violated § 3-302. As above, we do not know whether the December 10 meeting was subject to the Act.

As to the allegations concerning the school board’s closed-session practices, several principles apply. First, the public is entitled to observe the public body’s vote to close a meeting, so the public body must be given notice of the open meeting at which the vote will be held. A notice of a “closed meeting” is insufficient. We incorporate 8 *OMCB Opinions* 150 (2013), where we explained this principle and gave advice on wording for notices of meetings that will only be open for purposes of the vote.

⁴ Statutory citations are to the General Provisions Article of the Maryland Annotated Code (2014, with 2015 supp.)

Second, before a public body meets in closed session, its presiding officer must prepare a written statement that cites the applicable statutory exception, lists the topics to be discussed, and states the reasons for closing the meeting. § 3-305(d). The closing statements provided to us specify the topics to be discussed under a heading for “the reasons for closing” and omit the school board’s reasons for excluding the public from the discussion of those topics.⁵ Additionally, when a public body closes a meeting under the exception that permits a public body to close a meeting in order to comply with a requirement in another law, *see* § 3-305(b)(13), the public body should cite or describe that other law, and when a public body cites an exception, it should specify the topic that corresponds to it. For detailed advice on the elements of proper closing statements, we refer the school board to 9 *OMCB Opinions* 15 (2013) and Chapter 5 of the Open Meetings Act Manual (2015).

Third, the Act requires public bodies to include a summary of the closed session in the minutes of its next open session. The school board apparently posts these summaries as separate “minutes.” To ensure that the public knows where to find them, the school board’s open-session minutes should report that the closed session was held, incorporate the summary by reference, and tell the public where to find it.

Finally, we address Complainant’s general assertion that a public body that provides live streaming archived video of some of its meetings must do so for all of its meetings. Nothing in the Act supports the proposition that a public body that adopts streaming video as its minutes for some meetings must do so for all. Such a requirement would make little sense for public bodies that meet in locations without that capability, as might occur with a site visit, or on a day when staff are not available to operate the equipment. A public body does not violate the Act by posting some minutes in video form and some in written form.

⁵ For example, a public body that invokes the personnel exception to hold a closed session on filling a vacancy might state (if accurate) that the members are closing the meeting so that they can “discuss the qualifications of candidates candidly without potential harm to the reputation of any applicant.” 4 *OMCB Opinions* 46, 49 (2004). And, a public body that invokes the exception for “acquisition of real property for a public purpose,” § 3-305(b)(3), might do so “to avert speculative increases in land prices.” 3 *OMCB Opinions* 245, 247 (1997). The disclosures of such reasons are unlikely to compromise the confidentiality of the actual discussion. *See id.* At the same time, the disclosures cause the members of the public body to actually consider, before voting, whether a closed session is necessary, and they tell the public why it is being excluded. *See* 4 *OMCB Opinions* 46, 48-49 (2004) (explaining the purpose of the requirement).

Conclusion

As detailed above, we have found that the school board violated the Act with regard to various public notice and disclosure requirements applicable to closed sessions subject to the Act.

Open Meetings Compliance Board

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